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Supreme Court, U.S.
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No. 94-176

In The

# Supreme Court of the United States

October Term, 1994

TELELECT, INC.,

*Petitioner,*

vs.

KENNETH EARL FENSTERMACHER,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. (a) Does a defendant in a civil case have a fundamental due process right, equivalent to the Sixth Amendment Confrontation Clause right, to impeach witnesses by cross-examining them *on each and every fact* which might show they are biased or have a financial interest in the outcome of the case?

   (b) If such a right exists in a civil case, can a district court, within its discretion, rely on other considerations, such as Federal Rule of Evidence 403 or statutory collateral source limitations, to limit the amount of cross-examination of such bias or interest?

2. Are fact witnesses competent to testify about an event utilizing demonstrative photographic evidence derived from a reenactment, when their "personal knowledge" (pursuant to Federal Rule of Evidence 602) was based on what they saw firsthand at the time of the accident?

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## STATEMENT OF THE CASE

This action concerns a petition for review of a Kansas products liability action. The product is a T-5000 series insulated aerial lift device manufactured and sold by Defendant Simon Telelect, Inc. (Telelect), the Petitioner in this action. While using this product on May 14, 1989, Plaintiff Kenneth Fenstermacher, Respondent in this action, received serious electrical burn injuries resulting in the loss of both arms, including amputation of both shoulder joints. On October 17, 1990, Plaintiff filed his amended complaint against Telelect, alleging defects in design and warning, and seeking recovery of both compensatory and punitive damages on strict liability and negligence theories pursuant to Kansas law.

The case was tried before a jury from March 16, 1992, through March 31, 1992. On April 1, 1992, the jury returned a verdict finding Telelect 98% at fault and Kansas Power & Light (KPL), Plaintiff's employer and a non-party to the action, 2% at fault. The jury awarded Plaintiff compensatory damages totalling $8,154,998.12, including $880,000 in loss of services damages for the benefit of Plaintiff's wife, and determined that punitive damages should be assessed against Telelect. Following a punitive damages hearing, the trial court assessed $3,750,000 in punitive damages against Telelect. After statutory limitations were applied to the compensatory award, and following a decision on Telelect's Motion For a New Trial, further reductions in the judgment were made including subtraction in its entirety the $880,000 award for loss of services for the benefit of Plaintiff's wife based on the application of K.S.A. 60-19a02. On August 4, 1992, final judgment was entered against Telelect for $3,563,232.68 in

compensatory damages and $3,750,000 in punitive damages.

It is noteworthy that Petitioner's Statement of the Case goes to great lengths to argue facts that have little or nothing to do with the issues Petitioner strains to present to this Court. Nonetheless, since Petitioner's rendition of the facts appears to be calculated to sway this Court to review this matter regardless of the merits of the Questions Presented, Respondent is compelled to respond to the misstatements contained therein.

On Sunday, May 14, 1989, Plaintiff Kenneth Fenstermacher, a 20-year employee of Kansas Power & Light, was called to meet his line crew and replace a power pole which had been damaged in a car accident the night before. The KPL crew members present for this particular job were Foreman Kenworthy, and Linemen Ahlvers, Randel, and Fenstermacher. After making all preliminary plans, the crew, with Mr. Fenstermacher located in the bucket truck, began replacing the pole and preparing the new pole for installation.

The bucket truck Mr. Fenstermacher was using was marketed by Telelect as an "insulated" aerial lift device for use in energized line work.[1] For some inexplicable reason, Telelect chose to design the device so that the

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[1] Petitioner asserts that the insulated boom on this unit cannot protect the operator in the bucket from contact with two live lines or contact with one live line and a ground. The only truth in this statement is that the subject unit, as designed, failed to protect the operator who physically contacted a ground wire when, at the same time at a point some 5 feet from the operator, the boom came into contact with an energized line.

metal components of the bucket controls are interconnected with all other metal parts along the last 5-6 feet of the boom where the operator platform or bucket is located, creating an extremely hazardous condition for the operator. Yet there was no warning on the boom or in the bucket which notifies the operator of this hazard.[2]

Additionally, in excess of 90% of the metal components on the upper boom are covered with fiberglass or plastic shields which prevent direct conductor contact with the metal parts. Ironically, Telelect chose not to cover the metal part known as the Jib Cylinder Anchor Bracket (JCAB), which incidentally is located some 5 feet to the rear of the operator on the underside of the boom, hidden from the operator's view.[3]

Following replacement of the damaged pole, Mr. Fenstermacher began reattaching the power lines which had

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[2] Neither Mr. Fenstermacher nor any of the other crew members had any prior knowledge or warning of the bonding hazard. Moreover, not even Telelect's own distributor who sold the product was aware of this condition. The trial judge commented in his Memorandum and Order that the purported warnings Telelect made did "not even hint" at disclosing this hazard. Telelect, however, knew of the condition, yet maintained throughout trial that there was no defect in design or warning in the product.

[3] Contrary to Petitioner's assertions and/or implications, the boom tip metal parts are not just isolated from "ground" by the fiberglass boom, but are also isolated by the non-conductive covers. Therefore, as the testimony indicated at trial, if the JCAB had been covered, as other metal near the end of the boom, the plaintiff would not have been injured when the energized line contacted the underside of the boom.

been previously disconnected from the damaged pole. During this process, the "insulated" boom, at the site of the JCAB, came into contact with an energized line, energizing the controls. The 7200 volt circuit was completed when Mr. Fenstermacher placed one hand on the controls and held the neutral line in his other hand. The resulting shock and flash fire was devastating to Mr. Fenstermacher, as well as the crewmembers who witnessed the event.[4]

Mr. Fenstermacher filed suit against Telelect, Inc., contending that the product was defectively designed in that, among other things, boom tip metal was left unnecessarily exposed, that all metal in the boom tip area was conductively bonded, and that there was no warning of this condition, termed hereinafter the "bonding hazard."[5]

On appeal and in this Petition, Telelect asserts that the key witnesses (the crewmembers) did not see the accident occur and therefore were not qualified to testify on those matters. However, *each crew member did see the incident occur;* each observed Mr. Fenstermacher operating the bucket at various stages of the work just before the circuit was formed. Most importantly, instantaneous with the formation of the circuit, each crew member on

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[4] Previous Telelect designs placed the JCAB on the upper side of the boom in clear view, reducing the chance of inadvertent line contact, as evidenced by the lack of similar accidents for that design as compared with the newer design.

[5] The "bonding hazard" creates a situation where energized line contact with any metal in the boom tip energizes all boom tip metal, including the controls. Consequently, the operator is unknowingly exposed to the risk of death or serious injury when his hand touches the energized bucket controls.

the ground heard a "frying" or "arcing" sound, and immediately looked up at the boom and bucket and saw the unforgettable image of Mr. Fenstermacher on fire, and frozen in the circuit. Until the circuit was broken, the relative positioning of the boom, lines and Mr. Fenstermacher remained constant, giving each eyewitness a snapshot image of where all of the relevant structures (lines, boom, plaintiff's body) were positioned at the instant just before circuit formation as well as during circuit. Each crewmember observed Mr. Fenstermacher from different angles for what "seem[ed] like quite a while," up until the circuit was broken.

Armed with the indelible images of their fellow crewmember locked and frozen in the circuit, each eyewitness crewmember agreed to allow Plaintiff's counsel to photographically record what each witness remembered seeing on the day of the accident. For purposes of demonstrative evidence, each crewman's account of what he saw contemporaneous with Kenneth Fenstermacher's tragic injury was photographically documented through an accident site reenactment in September of 1991. Relying on their individual and collective memories, and measurements taken by KPL investigators on the day of the accident before any equipment or lines had been moved, these eyewitness crewmembers repositioned all of the same equipment and lines as each was positioned and configured at the time of the accident. The demonstrative pictures were taken after the crewmembers confirmed the positioning of the lines and equipment. Each eyewitness crewmember testified that the photographs fairly and accurately represented what the witness saw on the day of the accident as it actually occurred.

During trial, Defendant Telelect attempted to admit a KPL memorandum which instructed a KPL supervisor that the company was cooperating with Mr. Nally, Plaintiff's counsel, in his efforts to help Mr. Fenstermacher. The memorandum also made reference to potential restitution of the company's subrogation interest related to worker's compensation benefits paid on Mr. Fenstermacher's behalf.

Upon objection by Plaintiff's counsel to the reference to the subrogation interest based on the Kansas collateral source law and Federal Rule of Evidence 403, the district court judge chose to allow the admission of the memorandum but with the reference to the unliquidated collateral source redacted. The evidence concerning the statement of KPL's cooperation with Plaintiff's counsel was left unaltered and admitted into evidence.

Petitioner asserts that following KPL's investigation, KPL assigned no fault to Telelect. Contrary to Petitioner's assertion that internal reports did not assign fault to the bucket truck, one of the four recommendations of the committee (set out in an internal Memo from Mr. Bennet to Mr. Kitchen) included a statement that KPL "modify the boom on all double buckets so there is some type of shield around this pin [where the line contact occurred]." This memo makes it clear that KPL did in fact consider the boom to be defective without a cover over the JCAB. This document was admitted into evidence as Defendant's Exhibit number 452.

## REASONS FOR DENYING THE WRIT

In an attempt to have its writ granted, Petitioner asserts numerous misrepresentations of the record and misleading assumptions and implications. Respondent will attempt to correct these misleading representations and assumptions. This Court should deny the Petition for the following reasons:

### I. Petitioner has not identified or posed any question which comports with Rule 10 of the Supreme Court Rules; the Questions Presented lack the significance and character that would warrant review by this Court.

Petitioner's Questions Presented fail to satisfy any of the requirements of Rule 10. Rule 10 of the United States Supreme Court Rules provides that a "petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Petitioner strains to phrase the Questions Presented in constitutionally significant terms. In reality, the issues raised by Petitioner concern discretionary evidentiary rulings of the trial court and in no way rise to the level of important reasons required for review by this Court. Although the factual support for the Questions Presented are phrased in matter-of-fact terms, those facts as stated by Petitioner were in dispute at trial and apparently decided by the jury to be contrary to Petitioner's characterization.

### A. The constitutional issues Petitioner attempts to raise through Question I and Question II were not properly raised in the trial court.

Question I deals with the Petitioner's assertion of a fundamental right to cross-examine a witness pursuant to the Due Process Clause of the Fifth Amendment. Petitioner asserts in its Statement of the Case that it raised the issue in the Court of Appeals. However, the record is devoid of any reference at trial to a Fifth Amendment Due Process Clause fundamental right to cross-examine at trial or in the appeals court. While Petitioner, on appeal, asserted in passing that it had a fundamental right to cross-examine a witness to show bias, never once was there an assertion of Fifth Amendment and/or due process violations. Nor was there ever any issue posed concerning whether Sixth Amendment Confrontation Clause rights should be extended to civil litigants through the Fifth Amendment.[6]

Similarly, Petitioner's Question II, dealing with the admissibility of testimony from fact witnesses concerning evidence developed through a reenactment, was not properly raised in the trial court either. The absence of proper objections to this evidence was thoroughly discussed in the lower appeals court opinion, (App. A to Pet. Brief, pp. 4-13), and will be discussed further below.

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[6] While Petitioner cited several criminal cases which referenced the Sixth Amendment Confrontation Clause, no specific argument was made to equate Fifth Amendment due process rights with Sixth Amendment confrontation rights.

It is a well established appellate principle that matters not properly raised at the trial level cannot be considered on appeal. Federal Rule of Evidence 103 provides that error may not be predicated upon the admission or exclusion of evidence unless a substantial right of the party is affected *and* "a timely objection or motion to strike appears of record, stating the specific ground of objection" if not obvious. Fed. R. Evid. 103(a). Generally, "an objection cannot be raised for the first time on appeal." *Higgins v. Martin Marietta Corporation*, 752 F.2d 492, 498 (10th Cir. 1985). In the absence of plain error, a specific objection is required to preserve the issue for appeal. *Blevins v. Cessna Aircraft Company*, 728 F.2d 1576 (10th Cir. 1984). "Further, the objection must be so definite as to indicate to the trial court the precise ground upon which the evidence is inadmissible or the ruling objectionable." *Neu v. Grant*, 548 F.2d 281, 287 (10th Cir. 1977). The trial court is entitled, under this rule, to be apprised of the claimed error, to consider the contention, and to correct possible error. *Id.* At trial, Petitioner failed to make proper objections and arguments on both of these issues.

**B. The decision of the court of appeals does not conflict with any decision of this Court, any United States court of appeals, or any other state court of last resort.**

Petitioner makes no argument nor cites any cases which indicate that there is any conflict among the jurisdictions concerning the trial court's discretion to limit the scope of bias evidence pursuant to Federal Rule of Evidence 403. While, on the reenactment issue, Petitioner cites two cases which it contends supports its assignment

of error (Pet. Brief, p. 23), the tenth circuit appeals court decision is consistent with those decisions and does not even imply any conflict. Apparently, Petitioner refuses to acknowledge that "the decision to exclude (or admit) evidence under this rule is within the sound discretion of the trial court, and will not be reversed absent a clear abuse of discretion." *Wheeler v. John Deere Company*, 862 F.2d 1404 (10th Cir. 1988). In short, neither Question Presented raises any jurisdictional conflict warranting review by this Court.

### C. Defendant's right to effective cross-examination was not violated by the trial court's discretionary limitation on the scope of testimony regarding bias.

Petitioner requests review of this case for the purpose of extending to the civil litigant the same degree of confrontational protection that is afforded an accused in a criminal case by equating the Fifth Amendment Due Process Clause with the Sixth Amendment Confrontation Clause. Petitioner asserts that the defendant was deprived of its fundamental due process right to cross-examine several fact witnesses when the trial court limited its questioning on bias evidence.

Even if the Sixth Amendment Confrontation Clause protections were extended to the civil litigant through the Fifth Amendment, the defendant's right to effective cross-examination was not violated at trial. In essence, Petitioner argues that if this had been a criminal case, the Court would be compelled to rule in its favor on this issue. Petitioner implies that in a criminal setting, the

defendant would have an absolute right to examine a witness on each and every piece of evidence that might show some bias on the part of the witness against him, and that the trial court would have no discretion through the use of Rule 403 or otherwise to limit the extent of bias cross-examination. Such a narrow interpretation of the law on this issue would obviate the need for Rule 403, and would obliterate the trial court's discretion in general on the admission or exclusion of evidence. That, however, is not the law.

Even the Sixth Amendment Confrontation Clause allows discretion in limiting the extent of cross-examination associated with the biases of witnesses. "The Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). The Confrontation Clause does not prevent a trial judge from imposing any limits on defense counsel's inquiry into the potential biases of a witness. To the contrary, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination . . . " *Id.*

The fourth circuit defined "bias" as "emotional partiality." *United States v. Greenwood*, 796 F.2d 49, 54 (4th Cir. 1986). The purpose of bias evidence is to expose the jury to the witness's special motive to lie. Not only can bias be shown from evidence showing a witness's financial interest in the outcome, it can also be shown by evidence of favoritism to the plaintiff. *Id.* However, even in the criminal setting, "[o]nce some inquiry into bias has been permitted, a trial court has discretion to limit the cross-

examination on the grounds of, *inter alia*, confusion of the issues or marginal relevance." *Id.*[7] In balancing the evidence, the trial judge should weigh all of the relevant factors, such as the value of the disputed evidence as compared with other proof of bias or impeachment adducible to the same end. *Eichel v. New York Central Railroad Co.*, 375 U.S. 253, 256 (1963) (Harlan, J., concurring).

Petitioner cites *Greene v. McElroy*, 360 U.S. 474 (1959), for the proposition that a fundamental right to cross-examine equivalent to the Sixth Amendment Confrontation Clause exists for the civil litigant. Petitioner's reliance on *Greene* is misplaced. While *Greene* does support the proposition that a party has a right to cross-examine witnesses, it does not provide support for the contention that a trial judge lacks discretion to limit cross-examination on bias evidence, as in the instant case.

In support of this contention, it is important to address the facts in *Greene*. *Greene* was a civil case involving a claim of due process violations committed by governmental administrative or regulatory agencies during the early 1950's. The issue was whether a governmental agency could deprive a person of his livelihood on the basis of fact determinations made in proceedings in

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[7] In *U.S. v. Greenwood*, in keeping with the general rule of deference to the trial court, the fourth circuit *affirmed* the lower court's decision *not* to admit certain evidence purported to have been offered for the purpose of proving bias and additionally found that the limitations on cross-examination did not constitute reversible error. *U.S. v. Greenwood* at 54, 55. Petitioner has cited no case in conflict with this case or its principles.

which the person is denied the traditional procedural safeguards of confrontation and cross-examination. The petitioner, an engineer and vice-president of a government contractor, was discharged from his place of employment due to a revocation of his security clearance by various governmental agencies. During his administrative appeal, he was vigorously examined concerning accusations that he was closely associated with the communist party from 1943-47.

Although requested to do so, the administrative agencies never disclosed the identity or source of the accusations made against the petitioner. Thus the petitioner was not allowed to confront his accusers at all, much less to cross-examine them. The unidentified witnesses against him appeared, not in person, but rather, in the form of hearsay evidence contained in reports filed with the government but not disclosed to the petitioner.

The Court pointed out the protection of the confrontation rights expressed in the Sixth Amendment and stressed the need for similar protection where administrative and regulatory actions were under scrutiny.[8] "Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process." *Greene*, 360 U.S. at 507.

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[8] Note that the Court did not address the issue in terms of a civil case in a court of law; instead, it limited the discussion to criminal actions and administrative/regulatory actions.

In *Greene* this Court held that the governmental agency was not empowered to deprive the petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination. *Greene*, 360 U.S. at 508. Thus, *Greene* stands for the proposition that a party has a right to cross-examine witnesses against him in an administrative proceeding, not necessarily to the extent afforded the criminal litigant, but some right nonetheless. It stands to reason that a similar right exists for the civil litigant. However, in the civil court setting, rules of evidence and the adversary process provide protection not necessarily afforded a litigant in an administrative proceeding.

Petitioner similarly relies on *Van Arsdall* to support its contention that Rule 403 was misapplied in this action. However, just as with *Greene*, *Van Arsdall* is inapplicable to this action. In *Van Arsdall*, "all inquiry" into bias was prohibited. *Van Arsdall*, 475 U.S. at 679. The key distinction in both *Greene* and *Van Arsdall* is that the litigant was deprived of all rights of confrontation and cross-examination.

In this case, contrary to Petitioner's urging, Defendant at trial was not prohibited from effectively cross-examining the witnesses as to bias. Petitioner asserts that because the judge restricted the scope of the cross-examination related to the worker's compensation claim, "Telelect's counsel was completely prevented from impeaching the KPL witnesses as to their bias." To the contrary, the judge restricted the cross-examination of the fact eyewitnesses only in the area of the subrogation interest of their employer. Defendant Telelect was

allowed extensive impeachment scope in the cross-examination of these witnesses both with inconsistent statements and bias evidence.

Bias facts made known to the jury through cross-examination included extensive testimony about each witness' personal relationship with Plaintiff and his family; the length of time each of the witnesses had known Plaintiff as a fellow crewmember and as a friend; and the social activities that they participated in together, as well as other testimony related to bias towards Plaintiff. Each eyewitness was asked and answered on cross-examination (as the record reflects) that he was instructed to cooperate with plaintiff's counsel.[9] Additionally, each witness affirmatively responded that he wanted to help Kenny Fenstermacher in his claim. Petitioner was not prohibited, as Petitioner incorrectly asserts, from inquiring into the biases of these witnesses. Only the degree or scope of the bias evidence was limited pursuant to specific Kansas statutory prohibitions (which Petitioner has never challenged) and the Federal Rules of Evidence.

Furthermore, in addressing the application of Rule 403, the relative probative value of the bias evidence must be considered. In this case, in spite of vigorous

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[9] Notably, each witness also testified that he was to cooperate with defense counsel as well, and the record reflects that several did cooperate with the defendant. During the course of the trial, it was revealed through testimony of crewmembers that the defense counsel had conducted its own reenactment utilizing KPL equipment and crewmembers without the knowledge of Plaintiff's counsel. Demonstrative photographic evidence similar to Plaintiff's was taken during that reenactment.

cross-examination by defense counsel, there was no evidence that any of the eyewitnesses to the accident ever received, saw or reviewed the memorandum. In any event, any financial interest biases of the KPL eyewitnesses would come from KPL's instruction that they cooperate with Plaintiff's counsel, not from their knowledge of their employer's unliquidated and unstated financial interest in the case. This instruction to cooperate was much more significant bias evidence, and Petitioner was not deprived of that evidence in the least. In fact, the memorandum which the Petitioner references, even as redacted, clearly sets out the instructions for the employees to cooperate with plaintiff's counsel.

In addition to this extensive cross-examination regarding the biases of these witnesses, each of these fact witnesses were cross-examined thoroughly on any perceived inconsistent statements either made in deposition or through documentary evidence. The KPL investigation documentary evidence, as interpreted by Petitioner, is itself inherently powerful impeachment evidence. As the lower district court pointed out in its opinion, there was extensive cross-examination of these witnesses. Obviously, Petitioner was not deprived of its right to effective cross-examination.

It is noteworthy that even Judge Garth, the only dissenting judge on the panel in the appeals court, concurred with the majority on the issue of bias. In summary, there was no fundamental error with regards to the limitation on the extent of cross-examination at trial.

**D. The confrontation rights to cross-examine witnesses in a civil case do not rise to the degree of protections afforded a criminal defendant through the Sixth Amendment Confrontation Clause.**

While respondent would agree that a civil litigant has a right to cross-examine witnesses, that right does not rise to the degree of confrontation protection afforded a criminal litigant through the Sixth Amendment Confrontation Clause. Sound reasons exist for the distinctions between the Fifth and Sixth Amendment and the civil and criminal litigant. Because both life and liberty may be at stake in the criminal proceeding, there are a number of distinctions between the criminal and civil evidentiary rules. For example, the burden of proof is much higher in the criminal setting. Additionally, the type of evidence admissible in a criminal setting is different; character evidence which would ordinarily be excluded in a civil case is admissible in the criminal setting by the accused to prove that a defendant is not capable of acting in the way charged. Fed. R. Evid. 404(a).

The framers of the Constitution recognized the distinctions between the criminal and civil litigant. The recognition of those differences is evidenced from the fact that the Sixth Amendment Confrontation Clause is directed to the criminal litigant; there is no application of the Clause to the civil litigant. Justice Thomas noted this distinction in his concurring opinion in *White v. Illinois*, 112 S. Ct. 736 (1992). "If one were to translate the Confrontation Clause into language in more common use today, it would read: 'In all **criminal prosecutions**, the accused shall enjoy the right to be present and to cross-

examine the witnesses against him.' Nothing in this language or in its 18th-century equivalent would connote a purpose to control the scope of the rules of evidence." *Id.*, 112 S. Ct. at 746 (emphasis added).

If the drafters of the Constitution had intended to extend the scope of the Confrontation Clause to the civil litigant, they certainly could have structured the Sixth Amendment to include civil litigants as well. Petitioner apparently recognizes this fact since it does not even attempt to argue that the Sixth Amendment Confrontation Clause applies to the civil litigant. Logic would dictate that the drafters of the Constitution did not intend to extend Sixth Amendment Confrontation Clause protections to the civil litigant. Consequently, this Court should not review this case on that basis.

## II. Under Federal Rule of Evidence 602, lay witnesses may testify about an incident utilizing demonstrative photographic evidence derived from a reenactment when their "personal knowledge" of the incident is derived from what they observed at the time of the incident.

Petitioner asserts that this case gives this Court an opportunity to give a much needed definition of the term "personal knowledge" in the Federal Rules of Evidence 602. In support of this contention, Petitioner asserts that the trial court allowed several witnesses to testify about their observations of a reenactment when those witnesses admitted they did not see the accident. In further support, Petitioner cites Judge Garth's dissenting opinion which incorrectly opined that these witnesses did not see

the incident and substituted reenactment evidence for personal knowledge of the incident.

The premise upon which Petitioner's Question is based contains several fatal defects in the form of false assumptions and mischaracterizations of fact which, when corrected, render the issue moot: (1) Each accident eyewitness who testified about the reenactment did so only as background and foundation for the demonstrative photographic evidence which was derived from the reenactment; (2) Each witness saw the accident as it was occurring and testified from his personal knowledge gained (not from the reenactment) but from his observations of the accident itself; (3) No "expert opinion" testimony was provided from any of the witnesses; and, (4) The only testimony which concerned an observation not derived from personal observation of the accident itself was not objected to at trial, and therefore, was not preserved for review.

The appeals court recognized each of these defects as evidenced from its discussion of the issue. (App. A to Pet. Brief, pp. 14-16). The discussion which follows addresses each of these flaws in more detail. In light of these critical errors of fact and reasoning, Petitioner's Question as presented clearly lacks the factual basis necessary to support review by this Court. The admission or exclusion of the reenactment evidence is reviewed under an abuse of discretion standard. *United States v. Rodriguez-Pando*, 841 F.2d 1014, 1018 (10th Cir. 1988).

**A. Contrary to Defendant's characterizations of the significance of the reenactment, the essence of the reenactment testimony was to provide background and foundation for the demonstrative photographic evidence which was derived from the reenactment.**

The only purpose of the reenactment was to acquire photographic evidence demonstrating what each witness saw on the day of the accident. The essence of the reenactment testimony was that each of the demonstrative photographs that were used at trial clearly and accurately represented what the respective witnesses observed on the day of the accident. (App. A to Pet. Brief, pp. 14-15). Each fact witness who used any of the reenactment photographs testified in precisely this manner.

In fact, in its Petition for Rehearing in the appeals court, Petitioner "agrees there would be no problem if the lay witnesses had simply repositioned the vehicles and the power lines according to their memories, and photographs had been taken to record the relative positions. Such photographs would be no more than illustrations of the lay witness' memories." (Appellant's Petition for Rehearing. p. 3). Petitioner inconsistently takes the position that these witnesses are qualified to perform the reenactment by repositioning the vehicles as they existed on the day of the accident, and can properly take demonstrative photographs, but then cannot testify about the reenactment in an effort to provide the necessary foundation required for the admission of the photographic evidence and show the accuracy of the evidence. Clearly, the admission of testimony concerning how the reenactment took place was not error.

**B. Each witness *did see* the accident as it was occurring and testified from his personal knowledge gained (not from the reenactment) but from his observations of the accident itself.**

As with Question I, Petitioner frames Question II with unsupported assumptions of fact stated in matter-of-fact terms as if undisputed. Petitioner insists upon asking the proverbial "When did you stop beating your wife?" question. In this case, Petitioner's question assumes that it is undisputed that the three KPL eyewitnesses to the accident did not see the accident happen and therefore have no personal knowledge of how the accident occurred. Based on this mischaracterization of the record, the question further assumes that the witnesses used the reenactment to obtain facts as a substitute for what they observed on the day of the accident. Both of these assumptions are blatant misstatements of fact and unsupported in the record.

The KPL crewmembers *did* see the accident. Each of these witnesses were present when Mr. Fenstermacher was injured. Each crewmember saw Mr. Fenstermacher at different stages of his work and testified about what he saw during that process. And most importantly, each witness saw Mr. Fenstermacher during the time he was locked or frozen into the electrical circuit; a circuit that continued for what "seem[ed] like quite a while." At the instant that each witness heard the "frying sound" and looked up, each saw what he would have seen if he had been looking at the precise moment that the circuit was completed. To say that these witnesses did not see the accident and had no personal knowledge of the incident is preposterous and a blatant misrepresentation to this

Court. Contrary to Petitioner's repeated insistence, these witnesses "saw" the accident and possessed the necessary personal knowledge as required by Rule 602. The appellate majority recognized this distinction and clearly addressed Petitioner's flawed characterization. (App. A to Pet. Brief p. 15).

### C. No "expert opinion" testimony was provided from any of the witnesses.

Petitioner insists that the testimony provided by the crewmembers consisted of "expert opinion." Yet the only testimony Petitioner identifies as expert opinion evidence is the reference to the east line rising up when the tension was released. However, as the appeals court correctly points out with regards to this issue, these witnesses only testified as to what they observed during the reenactment. (App. A to Pet. Brief, p. 14-15). No opinion was offered. Furthermore, the distinctions between this reenactment observation and what was observed at the time of the accident were clearly delineated. "There was no improper opinion testimony, and there was no testimony that required expert qualifications." (*Id.*).

In fact, even if the reenactment could be characterized as an "experiment" as Telelect untimely asserted on appeal, there is no requirement that all experiments and testimony regarding the results be performed by experts. Admission of experiment evidence is proper where the experiment was conducted under conditions that were similar to those which existed at the time of the accident. *Brandt v. French*, 638 F.2d 209, 212 (10th Cir. 1981). "The admission of testimony of experiments is a

matter resting largely within the discretion of the trial court." *Millers' National Insurance Co. v. Wichita Flour Mills Co.*, 257 F.2d 93, 99 (10th Cir. 1958). The "trial court is, of course, the first and best judge whether conditions of the experiment are sufficiently similar and enlightening to render the testimony based thereon admissible," and the Court "must not disturb the [trial] court's ruling on these critical issues unless [ . . . ] convinced it is clearly wrong." *Derr v. Safeway Stores*, 404 F.2d 634, 639 (10th Cir. 1968). As referenced previously, extensive testimony was provided establishing the similarity of the reenactment to the accident. The trial court acted well within its discretion in allowing this testimony.

**D. No objection was made to the reenactment testimony which concerned the only observation not derived from personal observation of the accident (the line rising testimony), therefore, this issue was not preserved for review.**

As previously stated, the only reenactment observation that was elicited by the three KPL crewmembers which was not observed by these same witnesses on the day of the accident was the observation that the energized line which made contact with the boom came up to meet the boom when tension was released from another line associated with the work. Petitioner asserts that it was error to admit the testimony evidencing this observation and that Petitioner was severely prejudiced as a result. Yet, in spite of the purported significance of this evidence, no objection whatsoever to this testimony was raised at trial. The absence of any objection to the east

line rising testimony belies the prejudice and surprise asserted.[10]

Petitioner maintains that it preserved the issue for appeal through its initial objection to the reenactment photographic evidence:

> Mr. Coughlin (Telelect's counsel):
>
> > Your honor, we are going to object to this photograph. What this is, this is a re-creation. This is an expert photograph. You are trying to re-create an accident using this witness as an expert. This witness was never listed as an expert. This photograph was never listed as an expert re-creation . . .
> >
> > * * *
> >
> > He is entitled to say what he saw. This is not a re-creation, accurate re-creation. He can say what he saw. No doubt about that. But to use this photo like he is doing a re-creation with an expert, he can't do that.[11]

This objection was made, not in response to the testimony concerning the line rising, but to the use of a

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[10] Petitioner characterizes the reenactment as a secret experiment conducted for the purpose of arriving at surprise evidence to be sprung on the defendant at trial. (Pet. Brief, p. 18). Yet the record is devoid of any evidence of surprise on the part of the Defendant at trial. And as the Tenth Circuit opined, "Telelect's failure to object [ . . . ] is additional evidence that there was no unfair surprise in this case." (App. A to Pet. Brief, pp. 12-13).

[11] Even Petitioner's objection at trial paradoxically (albeit ambiguously) concedes that the witness could testify about the reenactment freely without error as long as he did not use the photograph.

photograph which was taken during the reenactment.[12] In contrast to the objection to the use of photographs, when the line rising testimony was given by three separate witnesses over several days, not once did the defendant at trial object to the testimony. The lack of any objection not only precludes review, it indicates the relative insignificance of this testimony as to the outcome of the trial.

Even if proper objections had been made, the evidence would have been properly admitted. While this observation was not recognized on the day of the accident, the testimony made this fact clear. Again, it is important to note that this was the only evidence derived from the reenactment which did not have corresponding firsthand observations on the day of the accident by these witnesses. All of the other testimony concerning the reenactment was merely foundation for the demonstrative photographs which were used to illustrate what each of these witnesses saw contemporaneously with the accident.

In summary, on the issue of purported expert opinion testimony regarding the line rising, two factors are determinative: (1) No objection whatsoever was raised concerning this testimony; Telelect's objections only addressed the use of photographs taken at the reenactment; (2) The witnesses merely testified that they made this observation during the reenactment; there was no opinion testimony elicited at all.

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[12] Remember, as previously stated, that Petitioner ultimately conceded that the admission of the reenactment photographs was not error based on "expert opinion" objections.

While Petitioner attempts to highlight Judge Garth's dissenting opinion in support of its position, it is clear from reading the majority opinion on this issue that Judge Garth's reasoning and understanding of the facts in this case was flawed. The majority opinion in the tenth circuit expended substantial effort to explain the flaws in Judge Garth's opinion on this issue. (App. A to Pet. Brief, pp. 11-13, 15-16).

## CONCLUSION

The Petition does not present this Court with any significant conflict between the circuits or state courts of last resort, with fundamental error below, or with any other compelling reason to grant the writ. The issues raised concern nothing more than discretionary rulings on the admission of evidence and factual disputes and argument that are best decided, and that were decided, by the trial court. Consequently, the Petition is due to be denied.

Respectfully submitted this 26th day of August, 1994.

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